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LAW(MAKERS) OF THE LAND: THE DOCTRINE OF TREATY NON-SELF-EXECUTION

David H. Moore*

Responding to Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599 (2008).

Last year, in *Medellín v. Texas*,¹ the Supreme Court handed down its most important decision on the domestic status of treaties in almost two hundred years. The Court concluded that the International Court of Justice's (ICJ) judgment in the *Case Concerning Avena and Other Mexican Nationals*² is not binding federal law because the treaties rendering the judgment compulsory on the international stage are not self-executing. In the wake of that decision, Professor Carlos Vázquez, one of the foremost scholars on U.S. treaty law, has argued that one strain of the doctrine of non-self-execution — which I term the *Foster* doctrine — is invalid.³ The *Foster* doctrine emerges from what Vázquez considers an improper reading of the Supreme Court's foundational decision in *Foster v. Neilson*.⁴ The doctrine assumes that a treaty may itself, by means short of a clear stipulation that the treaty requires legislative implementation, indicate that it is domestically unenforceable.⁵ Vázquez's assault on this doctrine is full bodied. He argues that this brand of non-self-execution is inconsistent with the Constitution, long-standing precedent, other manifestations of the non-self-execution doctrine, and the best reading of *Medellín*.

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¹ 128 S. Ct. 1346 (2008).

² (Mex v. U.S.), 2004 I.C.J. 12 (Mar. 31).

³ Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599 (2008).

⁴ 27 U.S. (2 Pet.) 253 (1829), *overruled in part* by *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833). Although I label the target of Vázquez's article the *Foster* doctrine, I recognize that Vázquez does not entirely reject the *Foster* decision. He expressly "conclude[s] that it is too late to reject *Foster*-type non-self-execution entirely," Vázquez, *supra* note 3, at 610, but he rejects the broader reading of *Foster* that gives rise to the *Foster* brand of non-self-execution this essay defends.

⁵ Vázquez, *supra* note 3, at 602. Although *Medellín* has invigorated debate on the question, this essay assumes that a treaty that is non-self-executing under the *Foster* doctrine is not judicially enforceable but might nonetheless qualify in some sense as domestic law.

This essay challenges each assertion. Each stems from a focus on treaties' status as law of the land under the Supremacy Clause. But the propriety of the *Foster* doctrine is defined largely by the constitutional scope and allocation of lawmaking authority. Focusing on the authority of the lawmakers of the land rather than on treaties' status as law of the land, this essay concludes that the *Foster* brand of non-self-execution is supported by the Constitution, consistent with long-standing precedent, a coherent part of the non-self-execution doctrine, and endorsed by *Medellín*.

I. CONSTITUTION

Vázquez's rejection of the *Foster* doctrine, like so many challenges to the doctrine of non-self-execution, is driven by asserted implications of the Supremacy Clause.⁶ In his view, the Supremacy Clause renders treaties, like statutes and the Constitution, presumptively enforceable in U.S. courts.⁷ From a variety of constitutional perspectives, however, it appears that the Supremacy Clause is not the primary guidepost for assessing the validity of the *Foster* doctrine.

Under the traditional purposive account, which Vázquez endorses, the Supremacy Clause was adopted to restrict the sort of subnational treaty noncompliance that plagued the country during the period of Confederation.⁸ The Clause was not designed to address the scope of the federal treaty makers' authority to control the domestic implementation of treaty duties.⁹ Of course, the text of the Clause, like the text of any law, may reach further than its original or primary target.¹⁰ But it is worth noting that the Supremacy Clause's text itself highlights state actors, declaring that "the Judges in every State shall be bound [by treaties], any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."¹¹ This is not to suggest that the Supremacy Clause lacks any import for federal judges but that its

⁶ See also Carlos M. Vázquez, *Foster v. Neilson and United States v. Percheman: Judicial Enforcement of Treaties*, in INTERNATIONAL LAW STORIES 151, 151 (John E. Noyes et al. eds., 2007) [hereinafter Vázquez, *Foster and Percheman*] ("Some modern scholars and lower courts appear to view 'non-self-execution' as the rule and the Supremacy Clause as the exception.").

⁷ Vázquez, *supra* note 3, at 602, 606.

⁸ *Id.* at 605, 617–19, 621, 642; see also Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 698–99 (1995) [hereinafter Vázquez, *Four Doctrines*].

⁹ See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 446–49 (2000).

¹⁰ See Vázquez, *supra* note 3, at 676–77.

¹¹ U.S. CONST. art. VI, cl. 2. Vázquez's reading of the Clause omits the "state" qualifier. See, e.g., Vázquez, *supra* note 3, at 614 ("The bare text of [the Supremacy C]lause establishes that treaties are to be given effect by judges.").

textual focus remains on limiting the discretion of judges, particularly state judges, not of treaty makers.¹²

Like the text, the context and conventional understanding of the Supremacy Clause do not declare treaties to be the supreme law of the land as to all government actors. To the extent that treaties bind the President (an unsettled proposition), it apparently took the Take Care Clause,¹³ not the Supremacy Clause alone, to achieve that result. Moreover, none would assert that those to whom the Constitution assigns the authority to amend the document cannot eliminate the treaty power altogether notwithstanding the Supremacy Clause. Similarly, few would argue that the authority of Congress and the President to enact law is somehow constrained by treaties' status as supreme law of the land. If the Supremacy Clause does not address the effect of treaty making on the authority of these other constitutional lawmakers, it is not apparent why it would address the authority of treaty makers. Indeed, it would seem odd to assume that the supreme status of treaties does not limit the authority of potentially competing lawmakers but does limit the power of the treaty makers themselves. In light of the Constitution's carefully crafted checks and balances, one might expect the ability of one set of lawmakers to override the lawmaking of another set to receive more explicit treatment than the discretion of any given set of lawmakers to limit the exercise of its own authority.

In practice, the Supremacy Clause has not been invoked to restrict lawmakers' own authority to create something less than what the Supremacy Clause allows. Those authorized to amend the Constitution were able to adopt a Bill of Rights applicable only to the federal government, notwithstanding the fact that the Supremacy Clause renders the Constitution the supreme law of the land and binding on the states. Similarly, Congress and the President have been able to enact statutes that expressly eschew preemption of state law,¹⁴ that authorize states to opt out of federal requirements,¹⁵ that settle tribal claims and contain provisions that become effective only on the completion of certain conditions precedent by administrative, tribal, and judicial actors,¹⁶ and that do not impose binding obligations.¹⁷ The

¹² Cf. Carlos Manuel Vázquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154, 2209–10 (1999).

¹³ U.S. CONST. art. II, § 3.

¹⁴ See, e.g., 49 U.S.C. § 14501(a)(2) (2000) (delineating areas of state authority regarding transportation that Congress did not intend to restrict).

¹⁵ See 15 U.S.C. § 260a (2006) (governing daylight savings).

¹⁶ See, e.g., Soboba Band of Luiseño Indians Settlement Act, Pub. L. No. 110-297, § 10, 122 Stat. 2975, 2983 (2008).

¹⁷ See, e.g., 36 U.S.C. § 101 (2006) (requesting that the President issue an annual proclamation to designate "February as American Heart Month"); see also Nicholas Quinn Rosenkranz, *Non-Self-Execution and the Supreme Law of the Land* 6–7 (Sept. 26, 2008) (unpublished manuscript, on file with the Harvard Law School Library).

Supremacy Clause has not prevented these exercises of constitutional authority.¹⁸

Vázquez agrees that the Supremacy Clause does not prohibit lawmakers from adopting something less than the Clause allows to the extent he argues that treaty-makers can create a non-self-executing treaty by providing a clear statement of that intent or by negotiating and ratifying an instrument that is sufficiently vague, commits the parties to make “best efforts,” or requires the United States to take actions constitutionally committed to federal actors other than the treaty-makers.¹⁹ The Supremacy Clause does not limit the treaty-makers’ discretion to exercise their authority in these ways to produce a treaty that does not qualify for judicially enforceable, preemptive effect. If the Supremacy Clause did, the courts arguably should strike treaties that require action constitutionally committed to other federal actors. However, the accepted wisdom is that such treaties are merely non-self-executing.²⁰ One might respond that other features of the Constitution — limitations on the lawmaking discretion of federal courts and assignments of authority to specific sets of actors — compel this unique result for treaties that are vague or require action by other actors. But these same constitutional considerations — vesting of treaty-making, foreign affairs, and lawmaking authority in the political branches — support characterization of other treaties as non-self-executing as well.

All this suggests that attempting to answer the self-execution question by placing primary emphasis on the Supremacy Clause is misguided. The more relevant constitutional provisions are those that address lawmaking authority, not those that address the preemptive nature of the ultimate law; the focus is more appropriately on the authority of the lawmakers of the land than on the impact of the law of the land.

When one turns to constitutional provisions addressing federal power, one discovers the familiar effort to expand federal lawmaking and foreign affairs authority. Among other things, treaty-making au-

¹⁸ See Bradley & Goldsmith, *supra* note 9, at 447 & n.216. Vázquez challenges the argument that treaty-makers possess unilateral authority to tailor domestic implementation because the enactors of statutes possess such authority. Vázquez, *supra* note 3, at 676. In his view, the analogy between treaties and statutes fails because “[s]tatutes are made solely by the U.S. lawmakers” while treaties require the agreement of another state. *Id.* His argument is undercut, however, by his conclusion that “the treaty power includes a limited power to make domestic law that is related to, but not strictly part of, the treaty.” *Id.* at 683.

¹⁹ See, e.g., Vázquez, *supra* note 3, at 609, 630–31, 643, 694. Vázquez thus recognizes fairly broad authority to tailor domestic consequences in treaty-making, though not as broad as the *Foster* doctrine contemplates.

²⁰ See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. i reporters’ note 6 (1987).

thority is vested in the President and a supermajority of the Senate, while state treaty-making is prohibited. The President is authorized to recognize foreign governments, and the President and Congress empowered to regulate foreign commerce. As this textual evidence suggests and history confirms, the Constitution expands federal lawmaking and foreign affairs authority and vests the political branches with discretion in exercising that authority. This authority is subject to limitations, including procedures through which the authority must be exercised. But nowhere does the Constitution suggest that federal lawmakers may not decide to exercise this delegated authority less aggressively than the Supremacy Clause permits.²¹ More specifically, there is no suggestion, as Vázquez acknowledges, that in empowering federal actors the Constitution installed a binary switch whereby the treaty-makers must either decide to exercise their treaty authority and require judicial preemption of state law or forego that exercise to avoid preemption and judicial enforcement.²²

II. PRECEDENT

Foster and *Percheman* support this conclusion. Vázquez reads *Percheman* as repudiating *Foster* to the extent *Foster* permitted a treaty itself to support non-self-execution in the absence of a clear stipulation that the treaty's obligations were directed to the political branches.²³ However, the two opinions are better read as preserving a properly understood *Foster* brand of non-self-execution.²⁴

Before turning to *Percheman* to undercut the *Foster* doctrine, Vázquez seeks to minimize *Foster*'s non-self-execution holding as an alternative holding.²⁵ It appears, however, both that *Foster*'s non-self-execution holding was the primary holding and, more importantly, that the non-self-execution holding was significantly colored by what was in fact the alternative ground on which the Court might have relied: the conclusion that the treaty at issue did not apply to the land whose ownership was disputed.²⁶ The Court in *Foster* could have resolved

²¹ Cf. Duncan B. Hollis, *Executive Federalism: Forging New Federalist Constraints on the Treaty Power*, 79 S. CAL. L. REV. 1327, 1389–90 (2006) (recognizing executive discretion to invoke something less than the full treaty power in order to protect state interests).

²² Cf. Bradley & Goldsmith, *supra* note 9, at 405–09 (arguing that the power to refuse to consent to treaties includes the power to adopt non-self-executing ones).

²³ See Vázquez, *supra* note 3, at 644–45.

²⁴ For a helpful summary of the background to and the Court's analysis in *Foster* and *Percheman*, see Vázquez, *Foster* and *Percheman*, *supra* note 6.

²⁵ Vázquez, *supra* note 3, at 601, 628, 632–33; see also Vázquez, *Four Doctrines*, *supra* note 8, at 702 n.35.

²⁶ *But cf.* *Garcia v. Lee*, 37 U.S. (12 Pet.) 511, 516–22 (1838) (describing *Foster* as deciding that the land in question was not in Spanish control at the time Spain and the United States entered the relevant treaty); *United States v. Arredondo*, 31 U.S. (6 Pet.) 691, 710–11 (1832) (same); Tho-

the case on this alternative ground, concluding simply that the treaty with Spain on which the petitioner based his land claim did not apply because the land in question had been transferred to the United States before the treaty with Spain was contracted.

Whether in fact that land had been previously ceded to France and from France to the United States such that it was not the subject of the treaty with Spain was a matter of longstanding debate between the United States and Spain. The Court thought it “not improbable that” the treaty was drafted to avoid undermining either sovereign’s stance.²⁷ Under these circumstances, the Court would be bound to enforce the U.S. position inasmuch as “[t]he judiciary is not that department of the government, to which the assertion of [the United States’s foreign policy] interests against foreign powers is confided; and [inasmuch as] its duty commonly is to decide upon individual rights, according to those principles which the political departments of the nation have established.”²⁸ Through various acts, Congress had expressed its position that the land in question was U.S. territory prior to the treaty with Spain.²⁹ In light of the political branches’ position, the Court indicated that it “would” construe the treaty as inapplicable to the land claimed on the understanding that the land had previously been ceded to the United States.³⁰ But the Court did not so hold. Chief Justice Marshall noted that Spain’s instrument of ratification might support a different construction of the treaty under which petitioner’s land would have been ceded by the treaty, but only the Chief Justice and one other Justice were inclined to adopt that position.³¹

The Court avoided fracturing over the definitive interpretation of the treaty — a decision with foreign affairs implications — by concluding that the relevant provision of the treaty was non-self-executing. That conclusion was ostensibly based on the language of the treaty providing that Spanish grants “shall be ratified and con-

mas Buergethal, *Self-Executing and Non-Self-Executing Treaties in National and International Law*, 235 RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 303, 374–75 (1992) (arguing that *Foster’s* non-self-execution finding resulted from the political branches’ position that the treaty with Spain did not cover the land in question); David Sloss, *When Do Treaties Create Individually Enforceable Rights? The Supreme Court Ducks the Issue in Hamdan and Sanchez-Llamas*, 45 COLUM. J. TRANSNAT’L L., 20, 83–85 (2006) (characterizing *Foster’s* non-self-execution discussion as dicta).

²⁷ *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 311 (1829), *overruled in part* by *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833).

²⁸ *Id.* at 307.

²⁹ *See id.* at 307–09.

³⁰ *Id.* at 312.

³¹ *Id.* at 312–14.

firmed.”³² As the Court explained, notwithstanding the “different principle” incorporated in the Constitution by which treaties have the same effect as legislation, not all treaties are immediately enforceable in U.S. courts.³³ When a treaty “import[s] a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department.”³⁴ The obligation to ratify and to confirm Spanish grants used the “language of contract” and thus called for legislative enactment.³⁵ Congress apparently understood the treaty to require future legislative acts as well, for Congress authorized boards of commissioners and federal courts to review land claims covered by the treaty.³⁶ Consequently, the Court could not, absent implementing legislation, apply the treaty “to disregard the existing laws on the subject.”³⁷

While Vázquez seeks to reduce *Foster* to a hasty decision based solely on the language of the treaty itself, much more was at issue in the self-execution decision than the treaty language. *Foster* engaged in a broader separation of powers analysis of which the treaty language was one part. The issue in *Foster* was one with significant foreign policy implications, and the Court recognized that such decisions were within the discretion of the political branches. Although the political branches had staked out a position, the diplomatic dispute was live, and the Court left enforcement of that position to the political process, consistent with the political branches’ understanding that the treaty was to be implemented legislatively.

The *Foster* doctrine, properly understood, thus permits treaty-makers to adopt something short of a self-executing treaty and looks to separation of powers considerations beyond the treaty’s language in deciding whether they have. These separation of powers considerations may be present even when a treaty does not address domestic implementation, avoiding the sort of snark hunt that Vázquez and the *Medellín* dissent bemoan and that might result if the treaty’s terms were the sole consideration.³⁸

Percheman is consistent with this broader self-execution analysis. True, the *Percheman* Court highlighted the different language employed by the Spanish version of the treaty, language that did not re-

³² *Id.* at 310 (quoting Treaty of Amity, Settlement, and Limits, Between the United States of America and His Catholic Majesty (Adams-Onís Treaty), U.S.-Spain, art. 8, Feb. 22, 1819, 8 Stat. 252).

³³ *Id.* at 314.

³⁴ *Id.*

³⁵ *Id.* at 315.

³⁶ *See id.*

³⁷ *Id.*

³⁸ *See Medellín v. Texas*, 128 S. Ct. 1346, 1381 (2008) (Breyer, J., dissenting); Vázquez, *supra* note 3, at 607, 629, 633–38, 668–69.

flect a need for future legislative acts, and concluded that the English version, though using “the words of contract” and “stipulating for some future legislative act,” could accommodate immediate judicial enforcement.³⁹ Focusing exclusively on this difference in language, Vázquez argues that *Percheman* adopted a clear statement rule for non-self-execution stipulations. That is, Vázquez concludes that *Percheman* requires that treaties “insist” on or “stipulate” for non-self-execution and that these terms mandate a clear statement.⁴⁰ But the language differential was not the only basis for interpreting the treaty differently in *Percheman*.⁴¹

The separation of powers considerations that contributed to a finding of non-self-execution in *Foster* pointed in the opposite direction in *Percheman*.⁴² It was undisputed that the treaty with Spain applied to the land claimed by Percheman. Consequently, there was no risk of complicating U.S. foreign relations through adjudication of Percheman’s claim. Nor, the Court found, was there any evidence that the political branches wished to preserve an opportunity to legislate on the matter. International law already secured the grants made to individuals like Percheman in the ceded territories. As the security of the grants “would have been complete without the [treaty with Spain], the United States could have no motive for insisting on the interposition of government in order to give validity to titles which, according to the usages of the civilized world, were already valid.”⁴³ Finally, Congress had confirmed its intent to secure the grants by establishing procedures for confirming claims to land covered by the treaty, including authorizing the district courts to resolve claims like Percheman’s.⁴⁴ As a result, *Percheman* came out differently, not solely because of newly discovered language, though that is an easy point of distinction, but because (1) there was no threat to U.S. foreign relations or to the political branches’ foreign affairs discretion in litigating the treaty claim; (2) there was reason to believe that the treaty makers did not intend to accommodate future legislative discretion in implementing the treaty;

³⁹ *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 89 (1833).

⁴⁰ Vázquez, *supra* note 3, at 645.

⁴¹ The Court does say that awareness of the Spanish version “would have produced [in *Foster*] the construction” adopted in *Percheman*. *Percheman*, 32 U.S. at 89. Aside from being dictum, this statement does not clearly indicate that the Court would have held the treaty to be self-executing notwithstanding the other considerations at play. Perhaps the statement reflects Chief Justice Marshall’s inclination, reflected in *Foster*, to find for the land claimants. See *Foster*, 27 U.S. at 313. But cf. *Medellín*, 128 S. Ct. at 1362 (defending reliance on treaty language in assessing self-execution by noting that “Chief Justice Marshall found the language” differential to be dispositive in *Foster* and *Percheman*).

⁴² See Buerghenthal, *supra* note 26, at 375.

⁴³ *Percheman*, 32 U.S. at 88–89; see also *id.* at 86–87.

⁴⁴ See *id.* at 89–95.

and, (3) even if they had, Congress had effectively executed the treaty by providing means to achieve claim confirmation.⁴⁵

Rather than narrowing *Foster*, *Percheman* thus supports a self-execution analysis that looks to separation of powers notions to preserve the intent and authority of the political branches of the federal government.

III. QUARTERING THE NON-SELF-EXECUTION DOCTRINE

So understood, the *Foster* brand of non-self-execution coheres with other iterations of the non-self-execution doctrine. Vázquez undoubtedly advanced understanding of treaty execution by identifying various doctrines of self-execution.⁴⁶ However, the several doctrines paradigm arguably goes too far to the extent it supports the actual quartering of the *Foster* doctrine.

Vázquez strikes at *Foster* non-self-execution on the ground that it treats treaties differently than their Supremacy Clause companions, the Constitution and statutes. His rationale is faulty for three reasons. First, it is not clear that the Supremacy Clause requires equal treatment of the three sources of law it describes. As Vázquez necessarily concedes, the Supremacy Clause does not give the Constitution, laws, and treaties the same status.⁴⁷ The Constitution is “more supreme,” perhaps given its role as the organic document giving rise to, defining the creation of, and, at least as to statutes, delineating the content of the other forms of law.

Just as the Constitution is different from statutes and treaties, treaties are different from the Constitution and statutes. Treaties serve an external role that the Constitution and statutes do not.⁴⁸ Treaties give rise to obligations to and from coequal sovereigns. At the same time, the Constitution assigns treaties a domestic function. As discussed above, the Constitution does not require that treaty makers invariably exercise their authority to create preemptive judicially enforceable federal law in tandem with their authority to create external obligations. Given treaties’ dual character, it is not clear that a doctrine that inquires into whether the external exercise of authority is to be given the

⁴⁵ See also *United States v. Arredondo*, 31 U.S. (6 Pet.) 691, 710–14, 734–36, 742–44 (1832) (addressing claims to land clearly covered by the U.S.-Spain treaty and distinguishing *Foster* on the ground that *Foster* was based on the treaty itself, while statutory directives controlled the disposition in *Arredondo*).

⁴⁶ See Vázquez, *Four Doctrines*, *supra* note 8.

⁴⁷ See Vázquez, *supra* note 3, at 611.

⁴⁸ The dual nature of treaties was prominently acknowledged in *Medellín*. See *Medellín v. Texas*, 128 S. Ct. 1346, 1356 (2008) (“This Court has long recognized the distinction between treaties that automatically have effect as domestic law, and those that — while they constitute international law commitments — do not by themselves function as binding federal law.”); see also *id.* at 1357.

domestic effect the Supremacy Clause permits is inconsistent with the pairing of treaties with statutes and the Constitution. Indeed, one might argue that rejection of such a doctrine improperly treats treaties as if they were the same as the Constitution and statutes.

Second, even if the Supremacy Clause could be read to require equivalent treatment notwithstanding the uniqueness of treaties, it is not clear that the *Foster* doctrine necessarily results in unequal treatment. A non-self-executing treaty effectively delegates the task of giving treaty obligations domestic content and effect to another set of federal actors: Congress and the President. Similarly, statutes regularly effect a range of delegations.⁴⁹ Statutes cited in *Foster* and *Percheman* delegated to a board of commissioners the task of identifying land claims to be presented to Congress for confirmation.⁵⁰ The law at issue in *Curtiss-Wright*,⁵¹ another foreign affairs watershed, delegated to the President the decision to criminalize all or some arms sales to Bolivia and Paraguay during the Chaco War.⁵² Congress routinely delegates to the executive the opportunity to define the domestic effect of laws by enacting regulations and to decide when to prosecute violations of the law, profoundly affecting the law's domestic application. Granted, many of these delegations are explicit. But they are not invariably so, and implicit delegations may trigger separation of powers judgments about whether courts or agencies should take the lead in exercising lawmaking authority.⁵³ As a result, a doctrine that allows treaties to delegate decisions regarding domestic implementation, even implicitly, is on some level unexceptional.

Third, all four doctrines of non-self-execution, including the *Foster* brand, appear to be part of an organic whole; each doctrine is grounded in separation of powers concerns and employs separation of powers-based presumptions to guide the self-execution analysis. The private right of action doctrine, for example, reflects the separation of powers judgment that "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases," involving as it does not merely the decision whether "primary conduct should be allowed" but, for example, whether "to permit enforcement without the check imposed by prosecutorial discretion."⁵⁴ As a result,

⁴⁹ Even congressional-executive agreements may be non-self-executing, effectively reserving domestic implementation for a later date by the same or a subsequent Congress. See Bradley & Goldsmith, *supra* note 9, at 447.

⁵⁰ See, e.g., *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 89–95 (1833).

⁵¹ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

⁵² See *id.* at 312–13.

⁵³ See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984) (noting that Congress may implicitly leave statutory gaps for an administering agency to fill and that courts must not substitute their own judgment for reasonable judgments by the agency).

⁵⁴ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004).

“the background presumption is that ‘[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.’”⁵⁵

The nonjusticiability doctrine similarly rests on the recognition that lawmaking discretion of a certain scale generally belongs to the political branches.⁵⁶ But this is not a hard and fast rule. Constitutional and statutory lawmakers may authorize courts to give content to vague standards, but a treaty likely will not indicate whether the treaty-makers intended to do so. The nonjusticiability doctrine imposes a presumption, motivated by a particular vision of separation of lawmaking powers, that treaty-makers do not intend to grant that authority.

The *Foster* doctrine employs similar presumptions. The doctrine asks whether U.S. treaty-makers intended to require congressional implementation. If there is evidence of a subjective intent to eschew immediate judicial enforcement, the doctrine, based again on separation of lawmaking and foreign affairs powers, respects that intent. In this sense, the *Foster* doctrine is the corollary of the nonjusticiability doctrine. Nonjusticiability ensures that the political branches exercise lawmaking discretion; the *Foster* doctrine respects the way in which that discretion is exercised. At the same time, the treaty-makers may not have been clear as to whether they intended self-execution or not. As Vázquez and the *Medellín* dissent point out, in negotiating a treaty the executive may not have or take the opportunity to address domestic implementation.⁵⁷ The *Foster* doctrine, like the other doctrines, employs certain presumptions that ensure that courts do not hastily fill this void with a conclusion of self-execution.⁵⁸ These presumptions — for example, the judgment that a treaty is more likely non-self-executing if a finding of self-execution would effect troubling consequences⁵⁹ — again arise from recognition of political branch primacy in foreign affairs and lawmaking.

The constitutionality doctrine is likewise based on separation of powers concerns. At first glance, it appears that the doctrine is based on the explicit assignment of powers to specific actors within the political branches, while the other three doctrines arise from the assign-

⁵⁵ *Medellín v. Texas*, 128 S. Ct. 1346, 1357 n.3 (2008) (alteration in original) (quoting 2 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 907 cmt. a (1986)).

⁵⁶ See Vázquez, *Four Doctrines*, *supra* note 8, at 715.

⁵⁷ See sources cited *supra* note 38.

⁵⁸ In particular, such considerations are evident in the nonjusticiability doctrine, which Vázquez endorses. As a result, even if one reads *Medellín* as Vázquez prefers, as a manifestation of the nonjusticiability doctrine, *Medellín* still provides support for the *Foster* doctrine.

⁵⁹ See, e.g., *Medellín*, 128 S. Ct. at 1364.

ment of lawmaking and foreign affairs authority to the political branches rather than the courts.⁶⁰ From another angle, however, the constitutionality doctrine is, like its companion doctrines, based on the separation of powers between the political branches and the courts as evidenced by the fact that courts do not strike as unconstitutional a treaty that assumes obligations other political actors must fulfill. Rather, the courts designate the treaty as non-self-executing, effectively presuming that the political branches did not intend for the treaty to be immediately effective and respecting the limits on the judiciary's ability to compel domestic lawmaking.⁶¹

Despite Vázquez's contention that the *Foster* doctrine is different from other versions because it has its source in the treaty rather than the Constitution, it appears that the *Foster* doctrine is grounded, like the others, in a particular separation of powers vision and that it employs the same sort of separation of powers-based presumptions.⁶² One might attempt to distinguish the *Foster* doctrine by arguing that it permits treatymakers to intentionally avoid judicial enforcement without an explicit indication of non-self-execution, but as indicated above, other doctrines do that as well. All this reflects that the *Foster* doctrine is an unexceptional part of the non-self-execution doctrine.⁶³

IV. MEDELLÍN V. TEXAS

The Supreme Court provided further support for *Foster* non-self-execution in its landmark decision in *Medellín*. Vázquez offers several readings of *Medellín* and settles on *Medellín* as a nonjusticiability opinion consistent with a Supremacy Clause-based presumption of self-execution.⁶⁴ A different reading of *Medellín*, however, undermines each component of Vázquez's dismissal of the *Foster* doctrine.

The majority and dissenting opinions in *Medellín* reflect the debate over whether the issue of non-self-execution is primarily governed by

⁶⁰ See Vázquez, *Four Doctrines*, *supra* note 8, at 718.

⁶¹ See Vázquez, *supra* note 3, at 649.

⁶² Vázquez asserts that the constitutionality and nonjusticiability doctrines, in particular, "flow from the Constitution's allocation of powers among the branches of the federal government." *Id.* at 630.

⁶³ If there is one manifestation of the doctrine that differs sufficiently from the rest to warrant severance, it is not the *Foster* doctrine but the private right of action doctrine. The private right of action doctrine presents a question that is subsequent to the question whether the treaty is enforceable in U.S. courts, focusing on whether it is enforceable by the particular plaintiff in the absence of an independent state or federal cause of action. See *id.* at 629–30; Vázquez, *Four Doctrines*, *supra* note 8, at 719–22. Relatedly, that doctrine has a more limited effect, preventing only enforcement by the plaintiff and not judicial enforcement of the treaty through other routes such as in defense to a criminal prosecution. See *id.* As a result, if one quarter of the self-execution doctrine should be severed, it is the private right of action doctrine.

⁶⁴ See Vázquez, *supra* note 3, 602.

the Supremacy Clause's designation of treaties as law of the land or by the constitutional delegation of lawmaking and foreign affairs authority to the lawmakers of the land. Like Vázquez, the dissent emphasized the role of the Supremacy Clause in the self-execution question. The dissent opened by quoting the Supremacy Clause,⁶⁵ defined the question presented as "whether the Supremacy Clause requires Texas . . . to enforce[the] ICJ judgment,"⁶⁶ and reasoned "that the Supremacy Clause itself answers the self-execution question by applying many, but not all, treaty provisions directly to the States."⁶⁷

The majority, by contrast, did not focus on the Supremacy Clause⁶⁸ and endorsed the view that non-self-execution derives from the authority to make treaties. In defending its reliance on the treaty's text, the majority argued that the political branches, not the courts, should have "the primary role in deciding when and how international agreements will be enforced."⁶⁹ And although it cited various considerations that guided its self-execution analysis, the majority ultimately concluded that "[n]othing in the text, background, negotiating and drafting history, or practice among signatory nations suggests that *the President or Senate intended* the improbable result of giving judgments of an international tribunal" preemptive effect over state procedural rules that apply even to constitutional rights.⁷⁰ Reflected in this reasoning is the notion that the treaty makers are authorized to enter something less than a self-executing treaty and that the judiciary's role is to determine whether they have done so.

In so concluding, the majority did not treat *Foster* as an aberration that was corrected in *Percheman*. The Court relied heavily on *Foster* and cited *Percheman* as subsequent history that overruled *Foster* in

⁶⁵ *Medellín v. Texas*, 128 S. Ct. 1346, 1375 (2008) (Breyer, J., dissenting).

⁶⁶ *Id.* at 1377.

⁶⁷ *Id.* at 1380; *see also id.* at 1377–81, 1383, 1384–85, 1389.

⁶⁸ This omission — understandable given the majority's focus on the treaty makers' authority — leads Vázquez to conclude that the majority "ignore[d] the constitutional text." Vázquez, *supra* note 3, at 649.

⁶⁹ *Medellín*, 128 S. Ct. at 1363; *see also id.* at 1364 (reasoning that if it is unlikely the political branches would authorize enforcement of all ICJ decisions, including politically sensitive ones, the political branches, not the courts, should decide which judgments to enforce).

⁷⁰ *Id.* at 1367 (emphasis added); *see also id.* at 1356 (stating that a treaty is self-executing when "the treaty itself conveys an intention that it be 'self-executing' and is ratified on these terms" (emphasis added) (quoting *Igartua-De La Rosa v. United States*, 417 F.3d 145, 150 (1st Cir. 2005) (en banc)); *id.* at 1358 (pointing out that the language of the U.N. Charter does not "indicate that the [consenting] Senate . . . intended to vest ICJ decisions with immediate legal effect in domestic courts"); *id.* at 1362 (justifying reliance on treaty text on the grounds that the text is "negotiated by the President" and is "what the Senate looks to in deciding whether to approve the treaty"); *id.* at 1364 ("[W]e have held treaties to be self-executing when the textual provisions indicate that the President and Senate intended for the agreement to have domestic effect."); *id.* at 1366 ("Our cases simply require courts to decide whether a treaty's terms reflect a determination by the President who negotiated it and the Senate that confirmed it that the treaty has domestic effect.").

part but did not call into question *Foster's* explanation of the distinction between non-self-executing and self-executing treaties or even *Foster's* assessment of the English text of the treaty at issue.⁷¹ Further, the factors the majority considered in conducting its self-execution analysis reflect the same sort of separation of powers judgments involved in *Foster* and *Percheman*.

The Court searched for the treaty makers' subjective intent in observance of the treaty makers' primary control over lawmaking and foreign affairs. But the search for intent, difficult as it was, was also guided by separation of powers judgments. Thus, in addition to relying on the enforcement mechanisms contemplated under the U.N. Charter to discern the treaty makers' actual intent,⁷² the Court reasoned that where the treaty makers crafted international, and ultimately contingent, political means of enforcement, a finding of self-execution would infringe on both the discretion the political branches had retained to decide "whether and how to comply" and the political branches' broader foreign affairs authority.⁷³ Similarly, since no other signatory treats ICJ judgments as binding in domestic courts, the Court presumed that the U.S. treaty makers did not unilaterally assume a greater obligation notwithstanding the fact that the Supremacy Clause would allow them to do so.⁷⁴ And the Court considered the consequences of treating ICJ judgments as unassailable federal law as too dramatic to presume that the treaty makers intended that result.⁷⁵ The majority thus tethered non-self-execution to the treaty makers' authority and founded its self-execution analysis on separation of powers judgments reminiscent of *Foster* and *Percheman*.

The dissent was likewise unwilling to conclude that the Supremacy Clause mandates automatic enforcement of all treaties, acknowledging some authority in the treaty makers to assume non-self-executing obligations.⁷⁶ Consistent with this concession, the dissent likewise endorsed the use of separation of powers presumptions to guide the self-execution analysis. The dissent noted that the self-execution considerations endorsed by Supreme Court precedent seek to identify matters "more clearly the responsibility of other branches."⁷⁷ The subject matter of a treaty, for example, is "of particular importance" as treaties de-

⁷¹ See *id.* at 1356, 1358, 1362; Vázquez, *supra* note 3, at 646.

⁷² See *Medellín*, 128 S. Ct. at 1359–60.

⁷³ *Id.* at 1360; cf. Vázquez, *supra* note 3, at 663 (arguing that to the extent a treaty leaves discretion to decide whether and how to comply it would be "non-self-executing because nonjusticiable").

⁷⁴ See *Medellín*, 128 S. Ct. at 1363; cf. *id.* at 1361 (giving the Executive Branch's interpretation of the pertinent treaties great weight).

⁷⁵ See *id.* at 1364.

⁷⁶ See *id.* at 1380 (Breyer, J., dissenting); see also *id.* at 1364 (majority opinion).

⁷⁷ *Id.* at 1383 (Breyer, J., dissenting); see also *id.* at 1382–83, 1385, 1388–89, 1392.

claring war or proclaiming peace would address the political branches.⁷⁸ Treaties that do not “set forth definite standards that judges can readily enforce” similarly more likely address the political branches.⁷⁹ The broader Court thus accepts a role for the separation of powers considerations that feature in the *Foster* doctrine.⁸⁰

Whether any given separation of powers presumption is appropriate is fertile ground for debate going forward.⁸¹ Consistent with his argument that the Constitution, statutes, and treaties should receive equal treatment, Vázquez effectively accepts the presumption that a treaty is non-self-executing if it contains vague obligations. Should courts similarly presume that a treaty is non-self-executing if it effects significant changes in U.S. law? If other states do not assume a self-executing obligation? If the treaty contemplates other means of enforcement? If judicial enforcement threatens negative foreign relations effects or constricts political branch foreign policy discretion? These questions exceed the scope of this essay, but at a minimum raise the puzzle of why the *Foster* doctrine, with its separation of powers judgments, ought to fail if the presumption behind the nonjusticiability doctrine survives.

The use of separation of powers presumptions raises two additional issues. Such presumptions may effectively create a general presumption against self-execution. While the Court did not expressly adopt a presumption against self-execution, the separation of powers presumptions employed in *Medellín* make it more likely that courts will find treaties to be non-self-executing when the treatymakers do not expressly indicate otherwise. This makes the question of the constitutionality of declarations of self-execution all the more important.⁸² *Medellín*’s grounding in the authority of the treatymakers coupled with its recognition that treaty obligations have a dual international and domestic character⁸³ provide support for the validity of declara-

⁷⁸ *Id.* at 1382; see also *id.* at 1388 (indicating that judgments “touching upon military hostilities, naval activity, handling of nuclear material, and so forth” are “better suited for enforcement by” branches other than the judiciary).

⁷⁹ *Id.* at 1382; see also *id.* at 1385, 1388.

⁸⁰ Moreover, the majority suggested that if any quarter of the non-self-execution doctrine ought to be severed it is the private right of action doctrine. The majority defined the term “self-executing” to exclude that doctrine and noted that the doctrine applies after the self-execution decision has been made and is subject to an express presumption against recognition of private rights of action. See *id.* at 1357 n.3 (majority opinion).

⁸¹ Among other things, one might question whether certain separation of powers presumptions improperly infringe on the treatymakers’ authority by, for example, forcing treatymakers to be more explicit regarding treaties’ domestic effect than treatymakers would prefer.

⁸² See Vázquez, *supra* note 3, at 671, 690.

⁸³ See *supra* note 48; see also Vázquez, *supra* note 3, at 648 (noting that a superseded or unconstitutional treaty will remain binding internationally even though it does not qualify as domestic law).

tions of both non-self-execution and self-execution (though the final resolution of that question is beyond the reach of this essay). At a minimum, such declarations provide strong evidence of the intent of the treatymakers inasmuch as declarations, unlike legislative history, only survive if they reflect the united intent of the President and two-thirds of the Senate.

Second, as the decisions in *Foster* and *Percheman* illustrate, the separation of powers presumptions that inform self-execution analysis could lead to a conclusion that a treaty is self-executing in one situation but not in another.⁸⁴ The *Medellín* Court resisted such a result.⁸⁵ If, as the *Medellín* Court intimated, treaties have a fixed character, that character may depend on the context in which the question of a treaty's self-executing character first arises. The treatymakers might avoid this problem by attaching declarations of non-self-execution or self-execution. Of course, forcing treatymakers to do so may hamper their foreign affairs discretion.

Vázquez respects treatymakers' authority to the extent he acknowledges their power to create some non-self-executing treaties, but his rejection of the *Foster* brand of non-self-execution constricts both that authority and the political branches' broader foreign affairs and lawmaking discretion. Vázquez's position is undercut by the Constitution, precedent, the similarity of other manifestations of the non-self-execution doctrine, and the Supreme Court's most recent application of non-self-execution. All these combine to sustain a non-self-execution doctrine grounded in separation of powers judgments that seek to respect the political branches' primacy in lawmaking and foreign affairs. So understood, the *Foster* brand of non-self-execution may be more "confounding"⁸⁶ than Vázquez's clear statement reading of *Foster*, but it is more consistent with the scope and allocation of the authority of the lawmakers of the land.

⁸⁴ Cf. Vázquez, *supra* note 3, at 656–57.

⁸⁵ See *Medellín*, 128 S. Ct. at 1362 (criticizing the dissent's approach as meaning that "the same treaty sometimes gives rise to United States law and sometimes does not, . . . depending on an ad hoc judicial assessment").

⁸⁶ Vázquez, *supra* note 3, at 601 n.5 (quoting *United States v. Postal*, 589 F.2d 862, 876 (5th Cir. 1979)).